Ndungu v Republic (Criminal Appeal 57 of 2019)
[2025] KECA 1094 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1094 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 57 OF 2019

JM MATIVO, PM GACHOKA & WK KORIR, JJA

JUNE 20, 2025

BETWEEN

NAFTARY NG'ANG'A NDUNGU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal against the judgment in the High Court of Kenya at Naivasha (R. Mwongo, J.) dated 2nd May, 2019 in CRA No. 61 of 2016)

JUDGMENT

1. A reading of the appellant's undated supplementary grounds of appeal and his submissions which he adopted during the hearing show that he is only challenging the sentence of 20 years imprisonment imposed upon him for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. The appellant was charged and tried for the said offence at the Senior Resident Magistrates Court at Engineer in Criminal Case No.945 of 2014. In a judgment dated 28th November 2016, the learned Magistrate (Opakasi, RM) convicted him for the said offence. On 2nd December 2016, after considering the appellant's mitigation, the learned magistrate stated:

   "I have carefully considered the accused's mitigation. However, the offence the accused is charged with, which this court finds him guilty of carries a mandatory sentence of note (sic) less than {20 years) Twenty years. The accused, in his mitigation continues to deny the offence and he is hereby advised that he has a right of Appeal. Consequently, the accused is sentenced to serve 20 years in prison."

2. His appeal to the High Court at Naivasha being High Court Criminal Appeal No. 61 of 2016 against both the conviction and sentence was dismissed by Mwongo, J. on 2nd May 2019. In his notice of appeal lodged in this Court on 16th May 2019, the appellant sought to appeal against both the conviction and sentence. In his grounds of appeal dated 14th April 2019, the appellant cited four grounds all of

which challenged the finding by the first Appellate Court upholding his conviction. However, in his supplementary grounds of appeal and his submissions, the appellant is only challenging the sentence on grounds that:

a. the sentence is excessively harsh and unjust considering that he was a first offender; (b) the sentence does not go well with the provisions of the policy on sentencing directives, 2015 under paragraph *4 4*:1; (c) he is remorseful, and regrets his actions; (d) he has a wife, school going children and elderly parents who he used to support, hence pleads to be granted another chance; (e) this Court considers his mitigation and impose a non-custodial sentence; and, the provisions of Section 333 (2) of the *Criminal Procedure Code* be considered.

3. Based on the above grounds, the appellant prays that: (a) the sentence of 20 years imprisonment be set aside, that this court finds that the circumstances of this case did not call for a long sentence of 20 years; and this Court orders that he serves community service in lieu of the said order.

4. In support of his appeal, the appellant maintained that the circumstances of this case did not deserve a severe penalty. He cited the Court of Appeal decision in Thomas Mwambu Wenyi vs. Republic [2017] eKLR in which it cited the Supreme Court of India decision in Alister Anthony Pereira vs. State of Maharashtra 2012 AIR SCW 930, 2012 (2) SCC 648 which underscored that the objective of sentencing is to inter alia impose an appropriate, adequate, just and proportionate sentence. The appellant stated that he has since reformed and listed several courses he has successfully completed and qualified while in prison and implored this Court to impose a non-custodial sentence. He also cited Douglas Muthaura Ntoribi vs. Republic [2018] eKLR in which it was held that good working prisons should be able to reform convicts.

5. In support of his submission that the circumstances of this case did not deserve such a severe punishment, he cited Daniel Gichimu & Ano. vs. Republic [2018] eKLR which underscored the need to consider the accused person's mitigation and the circumstances under which the offence was committed. He maintained that the sentence of 20 years is excessive bearing in mind that he was 42 years at the time of his arrest and the life expectancy in Kenya is 72 years. In support of the foregoing statement, he cited Abdalla Mwanza vs. Republic Criminal Appeal Number 259 of 2012 which cited World Health Organization (WHO) statistics which put life expectancy in Kenya at 64 years.

6. Regarding his complaint that the period he spent in custody be considered in accordance with Section 333 (2) of the Criminal Procedure Code, the appellant cited this Court's decision in Ahamad Abolfathi Mohame & Ano. vs. Republic [2018] eKLR in support of the holding that a court is obligated to take into account the period an accused person spends in custody while imposing the sentence.

7. Mr. Omutelema, learned counsel for the State opposed the appeal on sentence. It was his submission that the appellant's mitigation was considered by the trial court while passing the sentence, which was upheld by the first Appellate Court. It was his submission that the circumstances of this case called for a severe penalty, because the victim was aged 12 years, and that her mother was disabled. Further, the appellant forcefully grabbed the complainant, forcefully took her to his house, defiled her and threatened her with a panga.

8. A reading of the provisions of the law under which the appellant was charged shows that Section 8 (1) creates the offence while sub-section (3) stipulates the penalty. It provides that a person convicted under the said sub-section shall be liable for imprisonment of not less than 20 years. The appellant is complaining that the sentence of 20 years imposed on him is harsh and excessive, therefore, we should interfere and substitute the said sentence with a lesser severe penalty. He proposed a non-custodial sentence.

9. The above provision falls into the category of statutory provisions which create mandatory maximum/ minimum sentences. Undoubtedly, the Legislature can bind the sentencing court by laying down the minimum sentence (not less than) and it can also lay down the maximum sentence. If the minimum sentence is laid down, the sentencing court has no option to impose a sentence "not less than" that sentence provided for. Therefore, the words "not less than" must be given their natural and obvious meaning which is to say, not below a minimum threshold and in the case of Section 8 (3) of the *Sexual Offences Act*, these words must be understood to mean the offence under Section 8 (3) is punishable with a minimum of 20 years imprisonment.

10. In the same vein, the Supreme Court in Republic vs. Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July 2024), categorically held that the mandatory minimum sentences in the *Sexual Offences Act* are not unconstitutional; and that trial courts have no discretion to go below the statutory sentences in sexual offences. The Apex Court held:

> "56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences, however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.
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> 57 ...In the Muruatetu case, this Court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities."

11. In light of the above finding by the Supreme Court affirming the lawfulness of penalties prescribed by the *Sexual Offences Act*, we are unable to interfere with the sentence.

12. The appellant invites this Court to order that the period he was in custody pending trial and conviction be factored while computing his jail term as required by Section 333 (2) of the *Criminal Procedure Code*. A reading of the record shows that on 17th October 2014, the appellant was granted a bond of Ksh. 1,000,000/=. However, he could not raise the said bond. An application to review the bond terms was made on 19th January 2015 and it was reduced to Kshs.300,000/= the same day. However, the record does not show when he was released after the reduction of the bond. However, an arrest warrant was issued on 11th August 2016 after he failed to attend court. He was presented in court on 17th October 2014. As stated above, the record is unclear as to the exact date he was released. Therefore, we cannot guess the period he was out. More important, having jumped bail, only to be re-arrested and brought back to court, the appellant cannot benefit from the provisions of Section 333 (2) nor can he benefit from this Court's discretion.

13. As stated earlier, the appellant abandoned his appeal against conviction. In light of our discussion and conclusions arrived at above, we find that the appellant's appeal challenging the legality of the sentence fails. Accordingly, this appeal is dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF JUNE, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

Deputy Registrar.